

**STATE OF ILLINOIS
BEFORE THE ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	:
On its Own Motion	:
	: ICC Docket No. 10-0398
Audit of Just Energy Illinois Corp	:
d/b/a Just Energy d/b/a	:
U.S. Energy Savings Corp.	:

**RESPONSE OF JUST ENERGY ILLINOIS CORP. TO THE
CITIZENS UTILITY BOARD MOTION FOR PROTECTIVE ORDER
AND ACCESS TO UNREDACTED AUDIT REPORT**

Just Energy Illinois Corp. (“Just Energy”), by its counsel DLA Piper LLP (US), respectfully submits this Response to the Citizens Utility Board (“CUB”) Motion for Protective Order and Access to Unredacted Audit Report (“CUB Motion”), as follows:

I. INTRODUCTION

CUB’s Motion should be denied. CUB seeks access to the confidential portions of the “Compliance Audit and Management Assessment of the Business and Sales Practices of Just Energy” (the “Audit Report”) submitted by NorthStar Consulting Group (“NorthStar”) to the Illinois Commerce Commission (“Commission”) on January 3, 2012. CUB suggests that it is entitled to access to the confidential portions of the Audit Report because it was involved as a complaining party in ICC Docket No. 08-0175, the proceeding that gave rise to the NorthStar Audit. However, nothing in the Commission’s April 13, 2010 Final Order in Docket No. 08-0175 gave CUB rights to any portion of the Audit Report, let alone confidential portions of that report. CUB’s attempt to challenge the Commission’s Final Order in Docket No. 08-0175 – including specifically the Commission’s treatment of confidentiality issues – was unanimously rejected by the Commission.

Although CUB is an intervenor in the instant proceeding, ALJ Gilbert's August 31, 2010 Ruling regarding CUB's intervention specifically noted that "[a] fourth-party oversight role [by CUB] is simply not contemplated by the initiating Order in this docket." (Aug. 31, 2010 Ruling at 3.) CUB's Motion provides no basis or explanation to permit such fourth-party oversight at this closing stage of the proceeding. Importantly, as explained in the Compliance Filing being submitted by Just Energy concurrent with this Response, Just Energy is agreeing to implement the recommendations set forth in the recommendation section of the Audit Report. Therefore, under the terms of the Commission's June 23, 2010 Order Initiating Audit in the instant docket ("Initiating Order"), nothing remains to be litigated or evaluated, and the matter should be closed.

The proposed Order Regarding Protection of Confidential Information ("Proposed Protective Order") submitted with CUB's Motion confirms that no legitimate purpose would be served by granting CUB access to the confidential portions of the Audit Report. Paragraph 8 of CUB's Proposed Protective Order would limit the use of Confidential Information to "preparation for and conduct of this proceeding." At this final stage, however, there is nothing further to prepare for or conduct. The Audit is complete, the Audit Report has been submitted consistent with the terms of the Initiating Order, and Just Energy has agreed to implement the Audit Report's recommendations. That concludes this matter under the plain terms of the Initiating Order. Accordingly, even under the specific terms of CUB's Proposed Protective Order, it is clear that CUB's request is moot, and CUB's Motion should be denied.

II. BACKGROUND

On April 13, 2010, the Commission entered its Final Order in ICC Docket No. 08-0175, which directed an independent audit of Just Energy's sales program in Illinois. (*See* ICC Docket No. 08-0175, April 13, 2010 Order at 49.) Although CUB was a party to that proceeding, the Final Order contained language regarding the treatment of the Audit Report that specifically excluded CUB with respect to access to the Audit Report:

Audit results will be submitted to the Commission, Staff, and USESC [Just Energy] no later than eight months after the Commencement Date.

(*Id.* at 50.) CUB sought rehearing of that Final Order, and included in its Application for Rehearing a request for a modification to the Final Order's treatment of access to confidential information. (ICC Docket No. 08-0175, CUB/AARP May 14, 2010 Application for Rehearing at 13.) The Commission voted unanimously to deny CUB's entire Application for Rehearing on June 2, 2010.

On June 23, 2010, the Commission issued its Initiating Order in the instant proceeding. Again, that Initiating Order said nothing about permitting CUB access to the Audit Report, let alone confidential portions of the Audit Report. The Initiating Order set forth a procedure for the filing of the Audit Report. (*See* Initiating Order at 3.) The Initiating Order then stated:

Unless Respondent [i.e., Just Energy] voluntarily agrees to implement the Audit's recommendations, a new docket shall be promptly opened to review the Audit's recommendations, Respondent's responses to those recommendations, and to enter an appropriate implementation Order.

(*Id.*)

On June 28, 2010, CUB sought to intervene in the instant proceeding. Neither CUB's Petition to Intervene nor CUB's July 13, 2010 Response to Just Energy's Opposition to CUB's Petition to Intervene said anything about a need for CUB access to the Audit Report, let alone the

confidential portions of the Audit Report. ALJ Gilbert's August 31, 2010 Ruling regarding CUB's intervention request carefully evaluated the purpose of the Audit, and emphasized its limited scope and focus on reducing complaints, rather than turning the audit process into any attempt "to trawl for or remediate past violations." (Aug. 31, 2010 Ruling at 4.) That Ruling emphasized that "[a] fourth-party oversight role [by CUB] is simply not contemplated by the initiating Order in this docket." (*Id.* at 3.) ALJ Gilbert also recognized the possibility of a subsequent proceeding that would ensue *if* Just Energy challenged the Audit Report's recommendations (pursuant to the Initiating Order language quoted above). According to the ALJ's Ruling, in that instance:

[N]othing in the Initiating Order would preclude an intervenor in the new docket from questioning *either* the conduct or substantive conclusions of the audit during that review.

(*Id.* at 4.) (Emphasis in original.)

As noted above, according to the Initiating Order, after the filing of the Audit Report, Just Energy was to state whether it agrees to implement the Audit Report's recommendations. (*See* Initiating Order at 3.) Concurrent with this Response, Just Energy has made a Compliance Filing stating that it agrees to implement the Audit Report's recommendations as set forth in the second column of Exhibit II-3 of the Audit Report, which is the recommendations section of the Audit Report. Just Energy also has submitted a Draft Proposed Order recognizing that, consistent with the process set forth in the Initiating Order, the fact that Just Energy has agreed to implement the Audit Report's recommendations brings this matter to a close.

III. ARGUMENT

CUB's Motion should be denied. The Commission's Final Order in the underlying proceeding provided CUB no specific rights to the Audit Report, let alone the confidential portions of that report, and CUB's request for rehearing on that point was denied. Similarly, nothing that has occurred in the instant proceeding indicates that CUB should have access to confidential portions of the Audit Report. On the contrary, ALJ Gilbert's Ruling regarding CUB's intervention contained strong cautionary language about CUB's limited role in this proceeding, which role was limited to participation if, but only if, Just Energy contested the Audit Report's recommendations. Just Energy has not contested those recommendations. Moreover, CUB's own Proposed Protective Order is premised on accessing confidential information solely for use in this proceeding; particularly since this proceeding is about to close, there is no legitimate use that CUB could make of the confidential information.

A. CUB Has No Right To Confidential Information Under the Final Order In Docket No. 08-0175

Although CUB initiated the proceeding as a complainant in ICC Docket No. 08-0175, the Commission specifically did not afford CUB a right to access to the Audit Report, let alone confidential portions of the Audit Report. On the contrary, the Commission's Final Order in Docket No. 08-0175 carefully defined the parties to receive the Audit Report as the Commission itself, the Commission's Staff, and Just Energy. (*See* ICC Docket No. 08-0175, April 13, 2010 Order at 50.) CUB's request for rehearing of that Order on the issue of confidential treatment of information was rejected unanimously by the Commission. (*See* ICC Docket No. 08-0175, June 2, 2010 Voting Record.)

The only reason specifically advanced by CUB for CUB to have access to the confidential portions of the Audit Report is stated at paragraph 7 of CUB's Motion, as follows:

As the Complainant which initiated the docket in which the audit was ordered, and requested the audit be conducted, CUB believes it is entirely appropriate and reasonable that it have access to the unredacted Audit Report.

(CUB Motion at 3-4, ¶ 7.) CUB's sentiment about the appropriateness and reasonableness of its access to confidential information is unpersuasive. CUB fails to cite any authority to suggest that its status as the complainant in a prior complaint case entitles it to any additional rights – much less unfettered access to the results of the Audit in this proceeding.

In short, the mere fact that CUB was the complainant in a related case provides no compelling basis for allowing access to confidential portions of the Audit Report, particularly since the recommendations of the Audit Report are not being contested by Just Energy.

B. CUB Has No Right To Confidential Information Under the Initiating Order Or ALJ Gilbert's August 31, 2010 Order In This Proceeding

Although CUB intervened in this proceeding, CUB never articulated as a reason for intervention any need to review the Audit Report. On the contrary, both CUB's June 28, 2010 Petition to Intervene and its July 13, 2010 Response to Just Energy's Opposition to CUB's Petition to Intervene were silent on that subject, providing nothing about a need for CUB access to the Audit Report, let alone the confidential portions of the Audit Report. Although CUB's Motion fails to acknowledge ALJ Gilbert's August 31, 2010 Ruling regarding CUB's intervention request, that Ruling carefully evaluated the purpose of the Audit, and emphasized its limited purpose and focus on reducing complaints, rather than turning the audit process into any attempt "to trawl for or remediate past violations." (Aug. 31, 2010 Ruling at 4.) Yet, under the circumstances presented – where Just Energy is agreeing to implement the Audit Report's recommendations – CUB's request for access to confidential information seems to potentially be aimed at doing just that.

ALJ Gilbert emphasized that “[a] fourth-party oversight role [by CUB] is simply not contemplated by the initiating Order in this docket.” (*Id.* at 3.) ALJ Gilbert also emphasized the potential for a subsequent proceeding if Just Energy challenged the Audit Report’s recommendations (pursuant to the Initiating Order language quoted above), and noted that CUB would have the opportunity to be involved in that subsequent proceeding, if it occurred. (*Id.* at 4.) However, under the circumstances of the case, that proceeding will not occur. CUB did not appeal ALJ Gilbert’s Ruling; thus, it is the law of the case for this proceeding. (*See, e.g., Reich v. Gendreau*, 308 Ill. App. 3d 825, 829 (2d Dist. 1999) (“The law of the case doctrine is based on the rationale that the failure of a party to challenge a legal decision when it has the opportunity to do so renders that decision the law of the case for future stages of the same litigation”)) Accordingly, CUB’s attempt to access confidential portions of the Audit Report is inappropriate and unjustified.

C. As A Result Of Just Energy’s Agreement To Implement The Audit Report Recommendations, This Matter Is Now Concluded

The Initiating Order contemplates two courses of action after the issuance of the final Audit Report. On one hand, if Just Energy were to contest the recommendations in the Audit Report, a new proceeding would be initiated, and litigation regarding the Audit Report’s recommendations would ensue. (*See* Initiating Order at 3.) In the alternative, if Just Energy “agrees to implement the Audit’s recommendations,” that process does not occur. As stated above, concurrent with this filing, Just Energy has made a Compliance Filing indicating that it agrees to implement the recommendations in the Audit Report.

As a result of Just Energy’s Compliance Filing, there is nothing else to do pursuant to the Initiating Order’s instructions but close this case, as the matter is now concluded. Providing

CUB with access to confidential portions of the Audit Report would, therefore, serve no useful purpose.

D. The Specific Language Of CUB's Proposed Protective Order Demonstrates That No Purpose Would Be Served By Permitting CUB Access To Confidential Portions Of The Audit Report

CUB attached a Proposed Protective Order to the CUB Motion. The Proposed Protective Order provides as follows:

8. Persons identified above shall use or disclose the Confidential Information only in preparation for and conduct of this proceeding, and then solely as provided in this Order, and shall take all reasonable precautions to keep the Confidential Information secure in accordance with the purposes and intent of this Order. This includes appropriate precautions to prevent the authorized transfer of information in any type of electronic format. **All Confidential Information produced or exchanged in the course of this proceeding shall be used solely for the purpose of this proceeding** or any appeal arising there from.

(Proposed Protective Order at 6, ¶ 8.) (Emphasis added.) This provision further demonstrates that there would be no purpose served by permitting CUB access to the confidential portions of the Audit Report. Because Just Energy has agreed to implement the Audit Report's recommendations, the instant proceeding is now over. There is simply nothing further to be done. Other than the CUB Motion, no other motions or requests for relief are pending, and Just Energy's Compliance Filing takes care of the need for Just Energy to indicate whether it will agree with or contest the Audit Report's recommendations.

The process set forth in the Initiating Order now has been complied with, and there is no further activity to occur in this proceeding. Accordingly, because CUB's Proposed Protective Order itself places a restriction on the use of confidential information such that it may be used "solely" for this proceeding, and because this proceeding is now at its conclusion, there is no necessary or legitimate reason to permit CUB access to the confidential portions of the Audit Report. By its own terms, CUB's Motion is moot.

IV. CONCLUSION

For the reasons stated, Just Energy respectfully requests that CUB's Motion for Protective Order and Access to Unredacted Audit Report be denied, and that the Commission grants such further relief as it deems just and reasonable.

Respectfully submitted,

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